

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 5, 2006

**BILLY BRITTON, III v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2002-D-2440     Steve R. Dozier, Judge**

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**No. M2006-00611-CCA-R3-PC - Filed February 23, 2007**

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The petitioner, Billy Britton, III, appeals the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that he received the ineffective assistance of counsel. Following our review of the record and the parties' briefs, we affirm the court's denial of post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Thomas O. McIntire, Nashville, Tennessee, for the appellant, Billy Britton, III.

Michael E. Moore, Acting Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy H. Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND**

The petitioner was indicted on one count of first degree premeditated murder and one count of felony unlawful possession of a weapon. Following a jury trial, the petitioner was convicted on both counts and received consecutive sentences of life and four years, respectively. His convictions were affirmed by this court on direct appeal. *State v. Billy Britton, III*, No. M2004-00448-CCA-R3-CD, 2005 WL 176496 (Tenn. Crim. App., at Nashville, Jan. 25, 2005), *perm. app. denied* (Tenn. May 31, 2005). The facts of the underlying convictions as summarized in our opinion on direct appeal are as follows:

On the morning of June 17, 2002, the [petitioner] and the victim, Quinton Collins, were engaged in an argument over ten dollars in rent money owed by the

[petitioner] to the victim's girlfriend. Following the argument, the victim told the [petitioner] that he and his girlfriend would have to vacate the apartment. Later that evening, eyewitness Robert Moore ("Moore") was outside his mother's apartment when he heard approximately two gunshots. He gathered his children and other family members and sent them inside.

Moore testified that he saw the [petitioner] chasing the unarmed victim as the victim ran toward the apartment. Moore stated that, during the chase, the [petitioner] was "cussing" and firing his gun; he further testified that he also heard the gun make a "clicking" noise, as if it was jammed. Moore further testified that, as the victim fell onto the porch of his mother's apartment, the [petitioner] stood over the victim and stated: "I'm gonna kill you mother f-ker. I'm gonna kill you. You gonna remember me. You gonna"- "if you die or live, remember to tell the police, 'Billy done it, Billy done it.'" Moore then testified that the [petitioner] fired approximately four more shots, "flashed" his gun, and fled the scene with another individual, later identified as Alrick Clardy.

As responding officers arrived, the victim was screaming, bleeding, and drifting in and out of consciousness. Two officers testified that, upon arriving, they asked the victim who shot him, to which the victim, in turn, identified the [petitioner] by name and provided the [petitioner's] address. Shortly thereafter, the victim was transported by ambulance to Vanderbilt Medical Center, where he died.

*Id.* at \*1.

On September 28, 2005, the petitioner filed a pro se petition for post-conviction relief, and following the appointment of counsel an amended petition was filed. An evidentiary hearing was conducted on February 3, 2006. At the hearing, the petitioner testified that as a child he was jumped on and tortured by other children because he was nice and "real clean [and] neat." The petitioner said he was sexually molested as a child by an older man who would enter his bedroom through the window. The petitioner also witnessed his mother being raped.

The petitioner recalled that he did not fight back when other children were doing mean things to him, but toward the end of his high school years a voice in his head started to tell him to fight. Thereafter, when the petitioner was scared or being attacked, the voice, "Wild Bill," would come out and fight. The petitioner said he could not do anything to stop "Wild Bill," and it was like he was "watching it on TV or something." The petitioner said that he was diagnosed as a manic depressive with schizophrenic traits and was prescribed Thorazine.

The petitioner testified that it was "Wild Bill" who murdered the victim. The petitioner recalled that the victim started verbally assaulting him, he tried to get the victim to stop, the victim pushed him, and then "Wild Bill" appeared. The petitioner stated that he told counsel about his

psychological problems, but he could not recall whether he specifically told counsel about “Wild Bill.”

On cross-examination, the petitioner admitted that the witnesses testified at trial that he had stood over the victim saying, “When you die, tell them Billy did it. Tell them Billy did it,” not “Wild Bill.” The petitioner said that he received treatment for his psychological problems from Centerstone in 1997 and prior to that at Charter in Alabama. According to the petitioner, he told counsel about “Wild Bill” during their first meeting at the justice center, and counsel said he was not going to pursue that line of defense. The petitioner acknowledged that he did not have trouble communicating with counsel prior to and during trial, but he said that he was not aware counsel could use his mental problems as a defense. When questioned by the court, the petitioner said that “Wild Bill” was also responsible for an attempted murder in 1997.

The petitioner’s trial counsel testified that upon undertaking representation of the petitioner, he investigated the facts of the case but did not do a thorough investigation of the petitioner’s background. Counsel said that he was somewhat aware of the petitioner’s mental condition but not to the extent the petitioner testified. The petitioner told counsel that he had received psychiatric treatment at Charter Retreat in Georgia, Bradford in Alabama, and the Giles County Mental Health Facility. Counsel stated that he did not obtain the petitioner’s psychiatric records because he was not able to locate any of the facilities where the petitioner said he received treatment. Counsel noted that the investigator who prepared the petitioner’s pre-sentence report was also unable to locate the facilities. Counsel stated that the first he heard about the petitioner getting treated at Centerstone was in the petition for post-conviction relief. Counsel said that he was familiar with Centerstone and definitely would have obtained those records had he been aware the petitioner had been treated there.

Counsel stated that he did not obtain a psychological evaluation of the petitioner because he did not see any issue regarding the petitioner’s competency to stand trial. Counsel said that he also did not think an evaluation was necessary to address the petitioner’s mens rea at the time of the offense, but had he known that the petitioner thought a “voice” was telling him what to do he would have given an evaluation serious consideration. Counsel testified that the petitioner did not mention “Wild Bill,” or he would have obtained a more complete psychiatric and social history.

On cross-examination, counsel stated that the defense theory was that the killing was not premeditated because the witnesses only saw the end of the argument. Counsel said that he discussed that theory with the petitioner before and during trial, but at some point during the trial the petitioner sent him a note that said, “Do you plan to bring up my medical history, the fact that [I am] on Thorazine for hearing voices and I sometimes go into rages when the trial begins.” Counsel stated that the petitioner never mentioned having an alter-ego or a rare multiple-personality disorder. Counsel admitted that he received some notes from the petitioner indicating that he was dissatisfied with his defense, and the petitioner had consistently, from arraignment until the week before trial, told him he intended to hire other counsel.

Following the hearing, the post-conviction court denied the petitioner's petition finding that: (1) the petitioner never made counsel aware of "Wild Bill"; (2) there was no way counsel could have discovered "Wild Bill" on his own; (3) counsel "aggressively" tried to locate the various mental health facilities where the petitioner said he was treated and noted that the petitioner did not provide the records from those facilities at the evidentiary hearing; and (4) the medical records from Centerstone that were provided by the petitioner dealt mainly with the petitioner's drug and alcohol addictions and feelings of depression; the records did not mention the petitioner having a schizophrenic disorder. The court concluded that the petitioner failed to show, by clear and convincing evidence, that counsel's performance was deficient and that such deficient performance prejudiced his case.

### ANALYSIS

On appeal, the petitioner argues that he received the ineffective assistance of counsel. Specifically, he asserts that counsel was ineffective for failing to obtain a psychological evaluation of the petitioner, follow-up on the petitioner's statements about his mental health, and develop a defense based on the petitioner's mental defect.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective

assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

In this case, the petitioner has failed to prove that he received the ineffective assistance of counsel. The petitioner first argues that counsel was ineffective for failing to obtain a mental health examination, however, the record does not reflect that the petitioner had an evaluation performed in connection with his post-conviction petition to prove what an evaluation would have revealed. While the petitioner did provide his records from Centerstone, the court noted that those records established the petitioner was diagnosed as suffering from alcohol and drug dependence and depressive disorder, not that the petitioner was schizophrenic. Counsel testified that he did not think a mental examination was necessary to address the petitioner's competency to stand trial or his mens rea at the time of the offense. Counsel explained, however, that had he known a voice was telling the petitioner what to do or known that "Wild Bill" murdered the victim, he would have seriously considered obtaining a mental examination.

The petitioner also argues that counsel was ineffective for failing to investigate his statements concerning his mental health and develop a defense based on his mental defect. Counsel stated that he tried to locate the mental health facilities where the petitioner said he had received treatment but was unable to find the facilities. Counsel noted that the investigator who created the petitioner's pre-sentence report was also unable to locate the facilities. The petitioner did provide records from Centerstone, but counsel testified that the first he heard about the petitioner receiving treatment at Centerstone was during the post-conviction proceedings and the petitioner did not provide the post-conviction court with records from the other facilities. Counsel testified that the petitioner did not tell him about his "Wild Bill" alter-ego, and the petitioner could not recall for sure whether he told counsel about "Wild Bill." Counsel testified that had he known a voice was telling the petitioner to do things he would have more thoroughly investigated the petitioner's mental health background. The petitioner admitted that he had no problems communicating with counsel during trial, and counsel stated that he spoke with the petitioner before and during trial regarding the theory of defense. Although the petitioner may have become dissatisfied with counsel's defense theory, we will not second-guess counsel's reasonably based trial strategy. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Moreover, even if it had been conclusively determined that the petitioner suffered from schizophrenia or had counsel presented a defense based on the petitioner's mental defect, it is not clear whether such evidence would have changed the outcome of the case because the evidence at trial was that the petitioner stood over the victim and said "Tell them Billy did it," not "Tell them Wild Bill did it." In sum, the petitioner has failed to prove that counsel's performance was deficient or that any deficiency caused him prejudice.

## **CONCLUSION**

Based on the aforementioned reasoning and authorities, we conclude the petitioner has failed to carry his burden of presenting evidence that preponderates against the findings of the post-conviction court. Accordingly, we affirm the judgment of the post-conviction court.

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J.C. McLIN, JUDGE